



March 25, 2002

Mr. Tim Molina  
Assistant Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2002-1459

Dear Mr. Molina:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160236.

The Office of the Attorney General (the "OAG") received two requests for information from the same requestor. The requestor seeks twelve categories of information concerning various beachfront properties in Galveston and Brazoria Counties. You inform us that some of the responsive information has been mailed to the requestor. However, you claim that the remaining responsive information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of information you submitted.<sup>1</sup>

You claim that some of the submitted information is protected from disclosure by the attorney-client privilege, Texas Rules of Evidence Rule 503 and the work product privilege, Texas Rules of Civil Procedure Rule 192.5. You rely upon these discovery rules to assert that portions of the submitted information are confidential by law pursuant to section 552.101 of the Government Code. However, our office has previously determined that "information [which] may be privileged in the civil discovery context . . . may not be

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

withheld under section 552.101 of the Government Code.” Open Records Decision Nos. 647 at 2 (1996), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under the predecessor to section 552.101). We recognize that Rules 503 and 192.5 are “other law” for purposes of section 552.022, but in this situation, no section 552.022 documents were submitted to us. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (“[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.”). Thus, we conclude that none of the submitted information may be withheld pursuant to section 552.101.

However, you also claim that some of the submitted information is excepted from public disclosure under section 552.107. Section 552.107(1) excepts from disclosure information that an attorney of a political subdivision cannot disclose because of a duty to the client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. ORD 574 at 3.

The submitted information contains communications among the General Land Office (the “GLO”), State of Texas (the “state”), their attorneys, and attorneys for another defendant that shares a common interest with the GLO and the state in a pending matter. You represent that these communications reveal the GLO’s and the state’s confidences and consist of legal advice and opinions rendered to the GLO and the state as clients. Having reviewed these communications, we agree that, in some instances, they reveal the GLO’s and the state’s confidences or an attorney’s legal opinion or advice. Therefore, you may withhold the information we have marked under section 552.107(1).

You also claim that portions of the submitted information are excepted from disclosure under the work product privilege and section 552.111. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney’s mental processes, conclusions, and legal theories.

Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* With respect to some of the information at issue here, you have satisfied the first prong of the work product test by demonstrating that the information relates to pending litigation. Furthermore, in some instances you have also met the second prong of the test by showing that the information tends to reveal an attorney's thought processes. Accordingly, we have marked the information that you may withhold under section 552.111.

We next address the applicability of section 552.111 and the deliberative process privilege to the remaining information that we have not already ruled is within the purview of either the attorney-client privilege or the work product privilege. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. In this case, we find that the remaining information is purely factual information that does not reflect the policymaking processes of a governmental body. As such, the remaining information may not be withheld under section 552.111 and the deliberative process privilege.

You also claim that certain e-mail addresses are excepted from disclosure under section 552.137. Section 552.137 provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Section 552.137 requires the OAG to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no

indication that the member of the public consented to release in this instance, the OAG must withhold the e-mail address you have marked under section 552.137.

In sum, the OAG may withhold the information we have marked under sections 552.107 and 552.111. In addition, the OAG must withhold the e-mail address you have marked under section 552.137.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

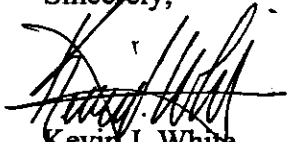
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin J. White', written over a horizontal line.

Kevin J. White  
Assistant Attorney General  
Open Records Division

KJW/seg

Ref: ID# 160236

Enc. Submitted documents

c: Mr. Robert Moore  
P.O. Box 16617  
Galveston, Texas 77552  
(w/o enclosures)